

Supreme Court, U. S.

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MICHAEL RODAK, JR., CLERK

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1975

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No. 75 - 1647  
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DAVID J. K. GRANFIELD,

*Petitioner,*

v.

CATHOLIC UNIVERSITY OF AMERICA,

*Respondent.*

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**REPLY BRIEF OF PETITIONER  
DAVID K. GRANFIELD**  
\_\_\_\_\_

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## TABLE OF CONTENTS

	<u>Page</u>
1. May a publicly-funded church-related institution of higher education shield its constitutionally suspect conduct by invoking the free exercise rights of a religious organization? .....	1
2. The Establishment Clause plays a crucial part in determining whether respondent's actions are attributable to the Federal Government.....	4
3. May a publicly-funded institution, because of a nominal church tie, violate with impunity the free exercise rights of individuals within its ambit of governance? .....	7

TABLE OF AUTHORITIES

	<u>Page</u>
<u>DiCenso v. Robinson,</u> 316 F. Supp. 112 (D.R.I. 1970) .....	1
<u>Lemon v. Kurtzman,</u> 310 F. Supp. 35 (E.D. Pa. 1969) .....	2
<u>Lemon v. Kurtzman,</u> 403 U.S. 602 (1971).....	2, 7
<u>Tilton v. Richardson,</u> 403 U.S. 672 (1971).....	2
<u>Kedroff v. St. Nicholas Cathedral,</u> 344 U.S. 94 (1952).....	3
<u>Serbian Eastern Orthodox Diocese v.</u> <u>Milivojevich,</u> 44 U.S.L.W. 4927 (1976) .....	3
<u>Hunt v. McNair,</u> 413 U.S. 734 (1973) .....	5

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1. May a publicly-funded church-related institution of higher education shield its constitutionally suspect conduct by invoking the free exercise rights of a religious organization?

Six years ago the District Court in DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I. 1970), said

" . . . private conduct which is heavily subsidized by the state may be viewed as state action and subjected to the same standards of impartiality which we demand of government. . . .  
Applying these standards to parochial

schools might well restrict their ability to discriminate in admissions policies, . . . and in hiring and firing teachers . . . . At some point the school becomes 'public' for more purposes than the Church could wish. At that point, the Church may justifiably feel that its victory on the Establishment Clause has meant abandonment of the Free Exercise Clause." 316 F. Supp. at 121-22 (citations and footnotes omitted; emphasis added).

The same thought was expressed by Chief Judge Hastie in his dissent in Lemon v. Kurtzman, 310 F. Supp. 35 at 52 (E.D. Pa. 1969). Justice Brennan, in concurring in Lemon and dissenting in Tilton, <sup>1/</sup> also focused on this proposition. Lemon v. Kurtzman, 403 U.S. 602, 651-52 (1971). And Justice Douglas in his dissent in Tilton stated "Once these schools become federally funded they become bound by federal standards. . ." 403 U.S. at 693-94.

Respondent rejects this equation. In its Brief in Opposition respondent has boldly asserted what was merely implied in the opinion of the Court of Appeals. We are told that Catholic University has "its own constitutional right to freedom from government interference." Respondent's Brief at 11. Respondent asserts that "acceptance of petitioner's argument would lead to an interference with the

<sup>1/</sup> Tilton v. Richardson, 403 U.S. 672 (1971)

University's exercise of . . . [its "own right to religious freedom"]." Respondent's Brief at 17. See also respondent's Brief at 15. This free exercise right, according to respondent, precludes judicial scrutiny of actions taken by the university, no matter how constitutionally offensive, in spite of the very substantial public funds drawn by the university from the federal treasury.

Respondent simply ignores the paradox of its position. Only a religious organization can enjoy the special free exercise rights of an organized church recognized in Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 115 (1952). See also Serbian Eastern Orthodox Diocese v. Milivojevich, 44 U.S.L.W. 4927 (1976). And a religious organization entitled to Kedroff-type free exercise rights necessarily is ineligible for public aid -- such aid, as aid to an organized church, would violate the Establishment Clause. Nevertheless, respondent wants to straddle this chasm.

Can respondent have its cake and eat it too? Can it draw federal funds but be immunized from the duties and responsibilities that normally accompany such funds? The issue is plainly of such fundamental importance that the writ should be granted.

2. The Establishment Clause plays a crucial part in determining whether Respondent's actions are attributable to the Federal Government.

Respondent seeks to avoid the impact of the imperatives of the Establishment Clause on this case. Respondent's arguments are couched in traditional state action terms as if this was just another routine 14th amendment-based case arising in a university context. The Establishment Clause is put to one side on the grounds that petitioner has not sought, as relief, a cut-off of all public funds to respondent. But the fact that this drastic relief was not sought against the university by petitioner does not render the Establishment Clause irrelevant. On the contrary, the Establishment Clause plays a pivotal role in determining the nature and quantum of governmental ties necessary for particular conduct of respondent to be attributable to the Federal Government.

Plainly, wherever public funds are granted to church-related institutions, the danger of exceeding the permissible perimeters of the Establishment Clause exists. Where, as here, a particular course of conduct engaged in by a publicly-funded church-related institution acts to jeopardize the legitimacy of the entire flow of public funds to the institution by markedly increasing the religious character of

that institution, vindication of the Establishment Clause requires on the part of the courts a readiness to examine either the institution's public funding as a whole, or in particular the course of conduct which markedly increases the institution's religious character. Where that course of conduct violates the constitutional rights of an individual, the fact that it also acts to jeopardize the legitimacy, under the Establishment Clause, of the institution's public funding should serve to greatly reduce the immediacy of the nexus required, and the general level of governmental participation required, for a holding that the challenged conduct constitutes governmental action.

This approach does little more than give effect in a new context to the primary effect test set out in Hunt v. McNair, 413 U.S. 734, 743 (1973). Maintenance of the clerical scale, inevitably tends to demonstrate that respondent is "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."<sup>2/</sup> For the logic of

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<sup>2/</sup> Indeed, in light of the direct flow of federal funds paid to respondent into faculty salaries, maintenance of the clerical scale also offends the second and alternative element in the Hunt v. McNair primary effect test as the federal monies fund a "specifically religious activity."

respondent's position is that petitioners, as priests, are and must be subject to the discipline of the church. See respondent's Brief at 18. Chief Justice Burger, rejecting state aid to parochial elementary and secondary schools, in Lemon v. Kurtzman, supra, states:

"We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education.

\* \* \*

. . . [W]hat has been recounted suggests the potential if not actual hazards of this form of state aid. The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith." 403 U.S. at 617-618.

In effect, respondent in its Brief argues (a) that petitioner Granfield is employed by a religious organization, and (b) that he is subject to the direction and discipline of religious authorities. Surely, if this is so, the pervasiveness of religion necessarily is so high at respondent as to jeopardize the legitimacy of public funding to the institution. And this fact should serve, in this case, to reduce the

hurdles normally placed in the path of a litigant seeking to challenge the constitutionality of conduct of a purportedly private institution.

What part the Establishment Clause is to play in determining whether particular conduct of a publicly-funded church-related institution of higher education is attributable to the Federal Government is an issue of fundamental importance. The writ should be granted to resolve this issue. 3/

3. May a publicly-funded institution, because of a nominal church tie, violate with impunity the free exercise rights of individuals within its ambit of governance?
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Respondent seeks to defeat petitioner Granfield's free exercise claim by insisting that the clerical scale "is made by priests of the same religion." Respondent's Brief at 16. Further, respondent asserts that when petitioners voluntarily

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- 3/ Respondent in its Brief at 16, footnote 16, asserts that petitioners have no standing as taxpayers to challenge the expenditure of federal funds under the Establishment Clause, since petitioners pay no federal income tax. In fact, petitioner Granfield has paid both Federal and Maryland income tax in the years 1973, 1974 and 1975, and has filed estimated quarterly returns with the Federal Internal Revenue Service for 1976. He clearly would have standing as a taxpayer-plaintiff to seek a total cut-off of federal funds to respondent.

became priests, they were well aware that they might be "subjected by their church" to certain restraints. Finally, respondent asserts that petitioners "as priests of religious orders, came to Catholic University with the approval of the Superiors of their orders, who control their assignments as priests and who were fully aware of the clerical salary policy." Respondent's Brief at 18.

This is misleading. The clerical scale is not imposed by priests, nor by a church, nor by petitioner's religious Superiors. It is imposed and maintained by a publicly-funded university. Indeed, the Court of Appeals specifically recognized that an "institutional declericalization" had taken place at respondent, and observed that:

During 1967-70 the University, which once functioned under the direction of the Roman Catholic Church, severed many of its ties with the Church. Only three schools now have "pontifical status" -- those being the schools of Theology, Philosophy, and Canon law. In 1969, a layman became president of the University. In addition, the student body and faculty, which were once nearly exclusively Catholic, gained significantly in non-Catholic percentage. Appendix A to Granfield's Petition at A-4, footnote 5.

This nominally Catholic but functionally secular institution is the agency which taxes petitioner

Granfield's free exercise of his religion. Imposition of the clerical scale on petitioner Granfield is a coercive intermeddling with his religious rights. The writ should be granted to settle whether a publicly-funded institution can, because of a nominal church tie, violate with impunity the free exercise rights of individuals within its ambit of governance.

Respectfully submitted,

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